

## REMARKS

Claims 1-12, 14-19, and 28-42 were pending prior to entering this amendment. Claims 1-12, 14-19, and 28-42 were rejected. Claim 1 has been amended to correct a typographical error. Claim 29 has been put into independent form. Claim 28 has been cancelled. Applicant requests reconsideration and allowance of the application.

### Claim Rejections - 35 U.S.C. § 102

Claims 14, 16-19, and 34-42 were rejected under 35 U.S.C. § 102(e) as being anticipated by Goldstein, *et al.*, (U.S. Patent 7,197,559).

MPEP section 715.09, titled "Seasonable Presentation" states that "Affidavits or Declarations under 37 CFR 1.131 ... are considered timely if submitted: ... (C) after final rejection, but before ... [the] date of filing an appeal, upon a showing of good and sufficient reasons why the affidavit or other declaration is necessary and was not earlier presented..." See MPEP 715.09, subsection C, citing 37 CFR 1.116(e). During an April 21, 2008 telephone meeting between Attorney Michael Cofield and Examiner Backhean Tiv it was agreed that a 1.131 Declaration to antedate Goldstein would be seasonably presented if submitted in a response after final rejection. Accordingly, Applicant seasonably presents the attached 1.131 Declaration.

Applicants wish to "swear behind" the Goldstein reference. Although the May 9, 2001, effective filing date for §102(e) purposes of portions of Goldstein that are supported the provisional application 60/289,923 predates the effective filing date of the present application (present application filed November 30, 2001), Applicants actually reduced the claimed invention to practice prior to the May 9, 2001 effective filing date of portions of Goldstein. Attached is a Section 131 Declaration signed by the inventors of the present application that attests to prior actual reduction to practice of present invention. Accompanying the Declaration is an invention submission form (Exhibit A) that was submitted by the inventors to their employers on January 21, 2001 and which corroborates and otherwise demonstrates the correctness of the declaratory evidence that the working model of the entire claimed invention was built and functioning at least before May 9, 2001. Also accompanying the Declaration is a copy of an email (Exhibit B) that was sent between the inventors on April 2, 2001 and which

further corroborates and otherwise demonstrates the correctness of the declaratory evidence that the working model of the entire claimed invention was built and functioning at least before May 9, 2001.

Applicant notes that a similar 1.131 Declaration was filed on May 8, 2007, which also referred to the attached Exhibits A and B. The Office Action dated July 25, 2007 stated that “[t]he Declaration filed on 5/8/07 under 37 CFR 1.131 is sufficient...”. The fact that the previously submitted Declaration citing Exhibits A and B was sufficient is believed to be pertinent to the Examiner’s analysis of sufficiency of the attached Declaration, which also cites Exhibits A and B.

Thus, for at least the reasons explained above, the rejection of claims 14, 16-19, and 34-42 should be withdrawn. Since there are no remaining rejections for these claims, claims 14, 16-19, and 34-42 should be allowed.

#### **Claim Rejections - 35 U.S.C. § 103**

Claims 1-12 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Goldstein in view of Klassen, *et al.*, (U.S. Patent 6,711,137).

Claims 1-12 should be allowed for at least the reason that Goldstein is not prior art.

Additionally, referring to claim 1, even if Goldstein were prior art (which it is not as explained above), Goldstein fails to teach certain claimed features of claim 1. For example, claim 1 includes the feature of “simulating a transaction between a customer and one or more electronic commerce servers located in an enterprise network, *said simulation performed using an access device located on a perimeter of the enterprise network.*” Goldstein fails to teach at least this feature.

Goldstein discloses an agent “installed on selected end-user computers within the various offices or organizations from which the transactional server is commonly accessed”. *See* Col. 2, lines 60-63. An end-user computer is not an access device located on a perimeter of the enterprise network; therefore, Goldstein does not disclose at least “simulating a transaction between a customer and one or more electronic commerce servers located in an enterprise network, *said simulation performed using an access device located on a perimeter of the enterprise network.*” In this way, Goldstein contains deficiency described in the background of

the present application. *See* the background of the present specification, page 2, lines 14-21, and page 3, lines 1-12.

Even if the end-user computer were an access device located on a perimeter of the enterprise network (which it is not), the alleged simulation by the agent does not measure performance of an electronic commerce application independently of network conditions outside the enterprise network of the electronic commerce server. For example, Goldstein's agent is installed in customer networks (*see* Col. 2, lines 60-63), thus the conditions *within the customer network* affect the test. Because the conditions within the customer network affect the agent's test, the alleged simulation by the agent does not measure performance of an electronic commerce application independently of network conditions outside the enterprise network of the electronic commerce server.

Even if the end-user computer were an access device located on a perimeter of the enterprise network (which it is not), and even if the alleged simulation by the agent measured performance of the transactional server independently of network conditions outside the server's network (which it does not), Goldstein's agent does not ping or otherwise measure network latency between the agent and the customer network because the agent is within the customer network. *See* Col. 2, lines 60-63.

In contrast, claim 1 includes the features of "simulating a transaction between a customer and one or more electronic commerce servers located in an enterprise network, *said simulation performed using an access device located on a perimeter of the enterprise network*", and "wherein said simulation using the access device measures performance of an electronic commerce application independently of network conditions outside the enterprise network", and "wherein said pinging measures network transport latency between the access device and the customer network independently of latency associated with the electronic commerce application". Thus, even if Goldstein were prior art (which it is not), claim 1 should be allowed for at least these reasons explained above. Claims 2-12, being dependent, should be allowed for at least the same reasons.

Claim 15 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Goldstein.

Claim 15 should be allowed for at least the reason that Goldstein is not prior art.

Claim 28 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Curley, *et al.*, (U.S. Patent Application Publication 2002/0120727) in view of Klassen.

Claim 28 has been cancelled.

Claims 29-33 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Curley, in view of Klassen, and further in view of Goldstein.

Claims 29-33 should be allowed for at least the reason that Goldstein is not prior art.

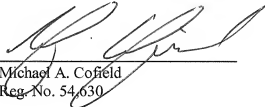
### **Conclusion**

For the foregoing reasons, the applicants request reconsideration and allowance of the application is requested. The applicants encourage the examiner to telephone the undersigned if it appears that an interview would be helpful in advancing the case.

**Customer No. 73552**

Respectfully submitted,

STOLOWITZ FORD COWGER LLP



Michael A. Cofield  
Reg. No. 54,630

STOLOWITZ FORD COWGER LLP  
621 SW Morrison Street, Suite 600  
Portland, OR 97205  
(503) 224-2170